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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 590.

BETHLEHEM STEEL COMPANY,
Petitioner,

against

ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY, LIMITED,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

BRIEF FOR RESPONDENT.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

BRIEF FOR RESPONDENT.

Opinions Below.

The opinions of the Court of Appeals (R. 70, 72) are not reported. The majority of the Appellate Division wrote no opinion. The minority opinion (R. 67) is reported in 254 App. Div. 839, 840, The opinion of Mr. Justice Rosenman at Special Term (R. 57) is reported in 164 Misc. Rep. 498.

Statement of the Case.

The suit is for damages for breach of contract in refusing to pay on demand 129.50 Swiss francs on each of 1455

semi-annual interest coupons (R. 10, 11) detached from 323 First Consolidated Mortgage Bonds owned by the respondent (R. 9) issued in the City and State of New York (R. 7) by Lackawanna Steel Company, a New York corporation (R. 7), in 1910 (R. 7) of which the petitioner has become the successor-obligor (R. 8, 9).

The alternative promises to pay are expressed in the bonds and coupons as follows (R. 12, 13):

$1,000.
U. S. Gold

£205.15.2 stg., M. 4,200 D. R. W.
Guilders 2,480 Francs 5,180

UNITED STATES OF AMERICA
State of New York

No. .....

LACKAWANNA STEEL COMPANY

Series A 5% Series A 5%

CONVERTIBLE

FIRST CONSOLIDATED MORTGAGE GOLD BOND DUE 1950

LACKAWANNA STEEL COMPANY (hereinafter called the Steel Company), for value received, hereby promises to pay to the bearer, or, if registered, to the registered holder of this bond, on the first day of March, 1950, ONE THOUSAND DOLLARS in gold coin of the United States of America or in London, England, £205.15.2 Sterling, or in Frankfort o/M., Germany, 4200 Reichsmarks, or in Amsterdam, Holland, 2480 Guilders, or 5180 Francs, if paid in France, Belgium or Switzerland, and to pay interest on said principal amount from March 1, 1910, respectively in said respective currencies, at the rate of five per centum per annum, semi-annually, on the first days of March

and of September in each year, upon presentation and surrender of the interest coupons hereto annexed, as they severally mature.

FORM OF COUPON.

$25.

On the first day of 19 , unless the bond hereinafter mentioned shall have been duly called for previous redemption, LACKAWANNA STEEL COMPANY will pay to the bearer at its office or agency in the City of New York, U. S. A., TWENTY-FIVE DOLLARS, United States Gold, or in London, England, £5.2.10½ Sterling, or in Frankfort o/M., Germany, M. 105, or in Amsterdam, Holland Gl. 62, or if paid in France, Belgium or Switzerland, Fcs. 129.50, being six months' interest then due on its First Consolidated Mortgage Gold Bond Series A, No. .....

$25 U. S. Gold
£5.2.10½ Stg.
Marks, 105.
Guilders, 62.
Francs, 129.50.

J. P. Higginson, Treasurer.

REVERSE SIDE.

Payable in New York, at the Company's office, London, at Speyer Brothers, Frankfort o/M., at Lazard Speyer-Ellissen, Amsterdam, at Teixeira De Mattos Brothers, Brussels, at Societe Generale De Belgique, Basel & Zurich, at Schweizerische Kreditanstalt.

The respondent, an insurance company of the Republic of Switzerland, purchased the bonds with the coupons attached for value and before maturity (R. 29, 30). The petitioner says in its statement (p. 5) that it pleaded that the respondent acquired its bonds with intent to evade the Joint Resolution. The statement is quite gratuitous. There is no such question in the case. No such question is argued. No such question survives the decision of the Court of Appeals in any event.

After the maturity of the coupons in suit, the respondent made presentment and demand to the petitioner's designated paying agent in Zurich and payment was refused (R. 32, 38).

Questions Presented.

1. Does the Joint Resolution of June 5, 1933 (48 Stat. L. 112), known as the "gold clause" resolution, deprive the holder of a multiple currency bond of his option, where by the terms of the contract he has the choice of receiving payment in a stated number of dollars in New York in gold, or a stated number of pounds in London, or a stated number of guilders in Amsterdam, or a stated number of Reichsmarks in Frankfort, or a stated number of francs in France, Belgium or Switzerland, and does it annul the obligation to pay the stated number of francs in Switzerland, when the holder has elected to receive payment in francs in Switzerland and has demanded payment of the obligor's designated paying agent in Zurich?

2. If so, does the Joint Resolution violate the Fifth Amendment of the Constitution of the United States?

We think the above presents the issue more sharply than does the petitioner's statement.

Statute Involved.

(Public Resolution—No. 10—73rd Congress)
(H. J. Res. 192)

JOINT RESOLUTION

To Assure Uniform Value to the Coins and Currencies of the United States.

WHEREAS the holding of or dealing in gold affect the public interest, and are therefore subject to proper regulation and restriction; and

WHEREAS the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts. Now, therefore, be it

RESOLVED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That (a) every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar

for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

(b) As used in this resolution, the term "obligation" means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term "coin or currency" means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations.

SEC. 2. The last sentence of paragraph (1) of subsection (b) of Section 43 of the Act entitled "An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes," approved May 12, 1933, is amended to read as follows:

> "All coins and currencies of the United States (including Federal reserve notes and circulating notes of Federal Reserve banks and national banking associations) heretofore or hereafter coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues, except that gold coins, when below the standard weight and limit of tolerance provided by law for the single piece, shall be legal tender only at valuation in proportion to their actual weight."

Approved, June 5, 1933, 4:40 p. m.

Decisions Below.

The Special Term of the Supreme Court of New York, on a motion for summary judgment, overuled the respondent's contentions that the Joint Resolution did not affect its right to the relief demanded in the complaint and that if construed as affecting such right it was unconstitutional for offending the Fifth Amendment of the Constitution of the United States (R. 3) and held that the respondent was only entitled to judgment for $25 per coupon, the same as though it had elected to receive payment in dollars not francs, gave judgment for the amount so calculated, and dismissed the complaint for any damages in excess of that amount (R. 4).

The Appellate Division of the Supreme Court of New York affirmed by a divided court, three to two, the majority writing no opinion, Mr. Justice Untermyer dissenting in an opinion in which Mr. Justice Callahan concurred (R. 67, 68).

The Court of Appeals of New York by a vote of five to two reversed and held that "on the facts of this case, the obligation was not payable in 'money of the United States' but in foreign currency and therefore the Joint Resolution is not applicable. The obligation might have become payable at New York in United States money, but the fact is that it did become payable in Switzerland in Swiss currency" and directed judgment for the respondent, Judge O'Brien writing for the majority and Judge Finch for the minority. (R. 71).

The petitioner says in its statement (Brief, p. 4) that that gives the respondent a premium on "the face dollar amounts of the coupons" and later on (*Id.*, 36) treats the

suit itself as a demand for dollars that had been deferred pending what it calls "an obviously futile demand" for Swiss francs, thus confusing a suit for damages for the breach of its promise to pay a specified number of Swiss francs with a demand for payment in dollars and ignoring the fact that its own default made it necessary to bring suit in a forum in which dollar damages only can be assessed.

SUMMARY OF ARGUMENT.

I. The obligation sued on is not an "obligation payable in the money of the United States", but is an obligation arising wholly from an independent promise to pay a stated number of Swiss francs in Zurich, Switzerland.

II. The Joint Resolution does not purport to touch the obligation in suit.

III. Upon the petitioner's construction the Joint Resolution violates the Fifth Amendment of the Constitution of the United States for (a) abrogating contract rights which did not obstruct the intended exercise of power by the Congress, and (b) arbitrarily discriminating between creditors in the same class.

ARGUMENT.

POINT I.

The obligation sued on is not an "obligation payable in the money of the United States", but is an obligation arising wholly from an independent promise to pay a stated number of Swiss francs in Zurich, Switzerland.

The decision of the Court of Appeals of New York on the construction of the contract and the legal effect of the exercise of its option by the respondent, involving as it does questions solely of local law, is binding on this Court.

Erie R. R. Co. v. *Tompkins*, 304 U. S. 64 (April 25, 1938);

Ruhlin v. *New York Life Ins. Co.*, 304 U. S. 202 (May 2, 1938).

It is not claimed that the Joint Resolution touches an obligation payable in Swiss francs in Switzerland.

It may be assumed that had the holder demanded payment in dollars in New York, it would have had to accept legal tender dollars, dollar for dollar, and could not have required payment in gold dollars, despite the "gold clauses" in the bonds and coupons.

The holder's election to receive payment in Swiss francs, evidenced by its presentment to and demand upon the petitioner's designated paying agent in Zurich, has in legal effect eliminated the gold provisions or clauses from the contract as effectively as though they had never been in the contract. There is here no question of payment in gold,

and no question of paying in the equivalent of gold dollars, or any kind of dollars. The obligation sued on, and the only obligation now in effect, is one to pay 129.50 francs in Switzerland on each coupon.

The dissenting Judges below were quite in error in supposing that the respondent was seeking to recover the equivalent of United States money in foreign currency (R. 73). It is seeking damages for the breach of an obligation to pay a stated number of Swiss francs without any regard to gold or the money of the United States. Since it has to seek relief in an American court its damages have to be assessed in dollars, but the breach complained of is the refusal to pay on demand 129.50 Swiss francs for each coupon presented.

There is no question of equivalence to gold or gold dollars in this case, such as was involved in *Holyoke Water Power Co.* v. *American Writing Paper Co.* (300 U. S. 324). The equivalence that matters is equivalence at the stated time of payment. That was one of the reasons that determined the alternative promises involved in that case, both of them, to be promises to pay money rather than to deliver gold as a commodity. Naturally when the alternative promises in the instant case were made, the specified quantities of the different currencies were equivalent. But the promise to pay a specified amount of each, as demanded by the holder at maturity, was necessarily made on the assumption that they might not be equivalent at that time and that the holder would demand performance of the alternative most favorable to him at the time of performance and to put those risks on the obligor. That is what makes the alternative promises involved in the instant case wholly independent. That is why the choice by the holder of one obliterates

all the others from the contract. That is why the alternative promises to pay in specified amounts of each of the foreign currencies named are not dollar promises and are no different in legal effect from independent alternative promises to pay in specified quantities of wheat, cotton or other commodities.

Obviously the alternative promises at the option of the holder were a great inducement to intending purchasers, who were thus assured of a wide market in which they could sell the bonds purchased and were also protected against the fluctuations of the currencies involved by having the right to demand payment in any one of them.

Purpose of Alternative Promises to Pay Specified Amounts of Each Currency Named.

The alternative foreign currency provisions were not "gold value foreign currency provisions" and were not inserted for the convenience of foreign holders as the petitioner says (Brief, p. 44). They said nothing about gold. A specified amount of the currency chosen by the holder was to be paid regardless of its relation to gold or the dollar at the time of payment. Had convenience in making payment been the purpose in mind, the promise would have been to pay the stated number of dollars, or their equivalent at date of payment in each of the other currencies named.

But each of the alternative promises was wholly independent of the others. No matter what happened to the dollar, the pound, the guilder, or the reichsmark, if the holder demanded payment in Zurich he was entitled to receive a stated number of Swiss francs, no more and no less, and the other alternative promises were in legal effect completely obliterated from the contract, having no more force

or effect than as though they had never been made. The obligation, the duty, of the obligor was then absolute to make payment in Swiss francs only and was not different in legal effect from an obligation to pay in wheat or any other commodity. How the obligor was to obtain the francs with which to make payment is of no concern. That was its lookout. The only purpose of specifying the exact amount of each currency which the holder could choose was to put the risk of fluctuations on the debtor.

Propositions Finally Settled by the Decision of the Court of Appeals.

(a) The alternative promises were wholly independent and of equal rank.

(b) The respondent, as a *bona fide* owner of the bonds from which the coupons in suit were detached, rightfully exercised its election to receive payment in Zurich in Swiss francs, 129.50 to the coupon.

(c) Upon the exercise of that right all of the alternative promises except the one chosen were eliminated from the contract as though never contained in it and the contract is to be enforced precisely as though it had originally contained only the one promise chosen by the holder.

See—

American Law Institute, Restatement of the Law of Contracts, Sec. 325 (2), *Comment a.*

(d) The illegality or impossibility of performance of the alternative promise to pay a specified number of gold dollars in New York did not relieve the petitioner of the obligation to pay the specified number of Swiss francs in

Zurich, which by the respondent's election has now become absolute.

See—

Yankton Sioux Tribe v. *United States*, 272 U. S. 351, 358-9;

Twaits v. *Penn. R. R. Co.*, 77 N. J. Eq. 103, 110; 75 Atl. 1010, 1013;

American Law Institute, Restatement of the Law of Contracts, Sec. 344, *Comment b;* Sec. 469;

Williston on Contracts, Vol. III, Secs. 1779, 1961.

The holding by the Court of Appeals that "on the facts of this case" the obligation sued on "was not payable in money of the United States but in foreign currency" settles those propositions, which the petitioner no longer contests.

Had there originally been, as there now is, only the one promise to pay 129.50 Swiss francs in Switzerland, the Joint Resolution would not apply to it. That is undisputed.

Is the chosen promise unenforceable and is the holder deprived of the right of election given him by the contract by reason of the fact that if he had elected to receive gold dollars he could not have enforced the alternative so chosen?

The Joint Resolution denied effect to the "gold clauses". The election of the respondent eliminated it from the contract.

POINT II.

The Joint Resolution does not purport to touch the obligation in suit.

Undoubtedly it is to be construed with the other Acts of the Congress in *pari materia*. This Court has already

considered those acts in their bearing on the purpose of the Congress in abrogating "gold clauses."

Norman v. *B. & O. R. R. Co.*, 294 U. S. 240.

The Thomas Amendment.

The Thomas Amendment of the Agricultural Adjustment Act of May 12, 1933 (48 Stat. L. 51) empowered the President to do a number of things in case he found, upon investigation, "that (1) the foreign commerce of the United States is adversely affected by reason of the depreciation in the value of the currency of any other government or governments in relation to the present standard value of gold, or (2) action under this section is necessary in order to regulate and maintain the parity of currency issues of the United States, or (3) an economic emergency requires an expansion of credit, or (4) an expansion of credit is necessary to secure by international agreement a stabilization at proper levels of the currencies of various governments". Among other things he was authorized to fix the weight of the gold dollar from time to time at not less than 50 per centum of its then present weight "as he finds necessary from his investigation to stabilize domestic prices or to protect the foreign commerce against the adverse effect of depreciated foreign currencies".

One of the dominating purposes thus revealed was, by lowering the value of the dollar, to reestablish, as far as might be, its former relation with other depreciated currencies, with the thought in the background of ultimately securing a stablization of currencies at proper levels by international agreement.

Devaluation alone would not accomplish the desired objective. The fluctuations in foreign currencies were too great and too variable, and were influenced by too many factors peculiar to each and wholly beyond the reach of the Congress. Devaluation might lead to an international agreement and in the meantime it would help to raise domestic prices and to some extent minimize the harmful effect of the depreciation of foreign currencies on our foreign commerce. The petitioner appears to assume (Brief, pp. 39-45) that the sole effect of the devaluation of the dollar on foreign commerce and foreign exchange within the contemplation of the Congress was its effect on our export trade. The recovery of our export trade doubtless was one of the main objectives aimed at, but of course the other necessary effects of devaluation were within the contemplation of the Congress. If the dollar were devalued, it would require less foreign exchange to buy dollars with which to purchase American goods or discharge dollar obligations and more dollars to buy foreign currencies with which Americans could purchase foreign goods or discharge obligations payable in such currencies. The Congress must have intended all of those effects since it could not produce one without the others. Manifestly it could not control the incidences of variable and diverse currency fluctuations. Those incidences would necessarily fall on some more heavily than on others. It was not possible to restore the former relation between the dollar and each of the foreign currencies.

The petitioner says (Brief, pp. 39, 40) that most of the nations of the world had already "directly or indirectly depreciated their currencies" and that most of their imports were "purchased from countries such as England".

Thus devaluation of the dollar tended as far as it went to restore the *status quo ante*. It did, except for temporary fluctuations, approximately restore the former relation between the dollar and the pound, concededly the most important of foreign currencies. That imposed no hardship on American debtors owing obligations payable in pounds or on American purchasers of English goods. It merely took away an advantage they had had after the pound went off gold and before the dollar was devalued. Most of the other foreign currencies had fallen more than the pound. Devaluation of the dollar to its former level with the pound merely lessened the advantages that American debtors owing debts payable in such currencies and American purchasers of goods of the countries having such currencies had enjoyed from the depreciation of such currencies. The Dutch guilder and the Swiss franc had not yet, though they have since, been devalued. Indeed of late they have been approaching their former relation to the dollar. Manifestly, the Congress could not deal with each foreign currency in detail. The situation confronting the Congress, as described by the petitioner, was that most of the nations of the world had depreciated their currencies. The Congress had to deal with that situation as a whole, leaving the incidences of variable fluctuations to fall as they might. Transactions in guilders or Swiss francs were not of sufficient consequence to stay the action the Congress decided upon to protect our foreign commerce from the adverse effects of the very general depreciation of foreign currencies, and moreover Holland and Switzerland were likely to join the procession, as in fact they have done. At most there can be only a limited amount of obligations of Americans

payable in Swiss francs or Dutch guilders that were outstanding when the dollar was devalued.

The bonds in suit were issued in 1910. A number of other bonds issued during that period by American corporations were wholly foreign currency bonds, as is well known. Americans were then borrowers from Euprope. Following the World War we became a creditor nation. We could no longer borrow in Europe. We became lenders. As is well known, billions of dollars were loaned by Americans to Europeans on dollar bonds. Indeed that has been assigned by many as one of the causes of the debacle of 1929. The foreign currency bonds issued by American corporations prior to 1914 still outstanding in 1933 must have been relatively few compared with the dollar bonds on which Americans had loaned money to Europeans prior to 1930. The devaluation of the dollar enabled European debtors to discharge their dollar obligations to American creditors with the devalued dollars and the Joint Resolution was equally impartial to foreign debtors.

Of course the Congress was aware of that situation. Criticism of foreign loans by American bankers was rife. Those loans were passed on to the public. Yet, if we accept the assumption made and question posed by the petitioner, petitioner would have us believe that while Congress took no heed of the effect of devaluation on the vast number of American creditors holding dollar obligations payable by foreigners, it would, nevertheless, if it had thought about it, have relieved the relatively few American debtors still owing obligations payable in foreign currencies either absolutely or at the option of the holders.

Obviously the Congress intended to leave the effects of devaluation on foreign commerce and foreign exchange

untouched, except as it undertook to stabilize the exchange value of the dollar. Those effects were beyond its control. It was at least hoped that on the whole they would balance. There certainly was no thought of attempting to deal with them in detail or of varying the general rule for exceptional cases.

Other Acts *in Pari Materia*.

Certainly the Congress did not intend to inhibit imports or the fulfillment of obligations payable in the currencies of other countries. By the Emergency Banking Act of March 9, 1933 (48 Stat. L. 1), the President had been empowered to regulate or prohibit "by means of licenses or otherwise, any transactions in foreign exchange" (*Id.*, Sec. 2), and the Secretary of the Treasury was authorized to require the surrender of gold (*Id.*, Sec. 3).

We emphasize the fact that the Executive Order of March 10, 1933 (No. 6073) provided *inter alia:*

> "No permission to any banking institution to perform any banking functions shall authorize such institution to pay out any gold coin, gold bullion or gold certificates except as authorized by the Secretary of the Treasury, nor to allow withdrawal of any currency for hoarding, *nor to engage in any transaction in foreign exchange except such as may be undertaken for legitimate requirements, for reasonable traveling and other personal requirements, and for the fulfillment of contracts entered into prior to March 6, 1933.*" (Italics ours.)

All acts of the President were confirmed by Section 13 of the Gold Reserve Act of January 30, 1934 (48

Stat. L. 337). That Act by Section 10 (a) authorized the Secretary of the Treasury to deal "in gold and foreign exchange, etc." *to stabilize the exchange value of the dollar.**

Thus under the authority of Acts *in pari materia* with the Joint Resolution, foreign commerce, foreign exchange, the payment of debts in foreign currencies contracted before March 6, 1933, and the stabilization of the exchange value of the dollar, were dealt with as fully and completely as the Congress intended to deal with them by monetary legislation. Normal transactions in foreign trade were to be continued. Debts payable in foreign currencies incurred prior to March 6, 1933, were to be discharged according to their tenor.

However, one problem that would be created by devaluation and by the suspension of gold payments remained unprovided for. Gold dollar obligations arising under "gold clauses"—seventy-five billions of them—created that problem. When the Act was under consideration in the Congress the amount, as shown by the debates, was thought to be $100,000,000,000. Those clauses, as construed by this Court in the *Norman* case, were "gold value" not "gold coin" clauses. If the dollar should be devalued as much as the Congress had authorized—50 per cent.—it would

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* The Attorney General of the United States in his Opinion dated August 22, 1933 (37 Op. of Atty. Gen'l. 250), dealing with an application by a New York corporation, under Executive order of April 20, 1933, to the Secretary of the Treasury for license to export gold coin of the United States to Belgium to fulfill a contract entered into in Belgium in 1932, held in effect that the Joint Resolution of June 5, 1933, did not relieve American obligors from the requirement to fulfill such obligations payable abroad in gold dollars only.

require two of the devalued dollars to discharge one dollar of such obligations. That would create a dual monetary system, a new dollar worth only its gold content in the payment of gold dollar obligations and legal tender in the payment of all other dollar obligations. If the gold obligations had been of limited amount, it would have been of no particular consequence, as the Committee on Banking and Currency said in its report to the House of Representatives on the Joint Resolution (H. R. Rep. No. 169, 73rd Cong., 1st Sess.). But they were being adopted almost as a matter of routine and the outstanding amount of them had assumed such proportions that a dollar of unequal debt-paying power, especially with a difference of 50 per cent., would seriously dislocate our domestic economy. And so the Joint Resolution was passed to deal with that problem and nothing else.

The Joint Resolution.

The Congress did not leave its purpose in passing that Resolution to inference, though that purpose is plainly revealed by the contemporary Acts above referred to. It stated in the title its purpose: "To Assure Uniform Value to the Coins and Currencies of the United States." It stated in the preamble its purpose, which it asserted to be its "declared policy * * * to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts". Debts payable in foreign currencies did not affect that purpose or that policy one iota. It might take more dollars to buy Swiss francs after devaluation than before, just as it would take more dollars to buy any other commodity after devalu-

ation than before. But the dollars used would all be of equal purchasing and debt-paying power. The money of the United States used would be of uniform value.

Even if the obligations of Americans payable in Dutch guilders or Swiss francs, either absolutely or in the alternative, had been larger, the guilders and the francs to discharge them could still be bought with dollars of equal purchasing and debt-paying power. The stabilization of exchange value was dealt with by the Gold Reserve Act. The maintenance of equal purchasing power and of equal paying power in the payment of dollar debts was dealt with by the Joint Resolution.

The Congress was not dealing with debts payable in foreign currencies when it passed the Joint Resolution. There is not a word in the Resolution, in any report or in anything said in debate to indicate it, despite the footnote on page 43 of the petitioner's brief. There is and can be no pretense that absolute obligations payable in foreign currencies were within the terms of the Joint Resolution, however it be construed. Debtors owing such obligations were left to bear the burdens or enjoy the benefits of variable fluctuations in the relation of the dollar to foreign currencies as events turned out.

American creditors to whom gold dollar obligations were owing, no matter by whom, had to accept the devalued dollars, dollar for dollar. The fact that foreign debtors owing gold dollar obligations—it has been estimated that between fifteen and twenty billions of foreign dollar bonds had been sold to the American public in the 1920's—were treated the same as American debtors and that no special consideration was given to the Americans who had bought such bonds

is cogent, if not conclusive, evidence that the Congress was dealing with the direct end to be attained, not its indirect effects, and had no more occasion to give special consideration to the relatively few American debtors still owing obligations payable in Swiss francs or Dutch guilders at the option of the creditors than it actually gave the American holders of at least fifteen or twenty billions of foreign dollar bonds.

Confusion of thought results from the failure to distinguish between dollars of unequal value, or debt-paying power, in the payment of dollar obligations and dollars of equal value and buying power in the purchase of foreign currencies or other commodities. Foreign currency obligations have to be paid in those currencies, not in dollars. How those currencies are obtained by the debtor to discharge his debt is of no moment. He may exchange other commodities for them or buy them with dollars, but his debt is paid with the particular currency promised, not with what he exchanges for the required amount of that currency.

There was certainly no occasion and obviously no intention to treat purchasers of foreign currencies with which to pay creditors, who happened to have a rejected option to require payment in dollars, any differently than purchasers of foreign currencies with which to pay creditors who had no such option, or indeed any differently than purchasers of other commodities. More of the devalued dollars would be required in either case. That was the necessary effect and indeed one of the declared purposes of the Thomas Amendment. Creditors and debtors, purchasers and sellers were all affected in different ways and in varying degrees dependent on circumstances.

The Congress certainly did not intend to single out one small class of purchasers of foreign currencies for special treatment. The Joint Resolution was passed to assure the uniform value of United States money and to maintain the equal power of the dollar. The Congress had no more thought of attempting to control the incidences of that any more than it attempted to control the incidences of devaluation. It was dealing with the monetary system of the United States, not with the incidental effects of its action on any group or class.

The petitioner assumes that the Congress gave no consideration to multiple currency bonds when it passed the Joint Resolution and poses the question whether, if it had done so, it would have excepted them (Brief, p. 38).

It would be more pertinent to inquire whether, not having included obligations in terms absolutely payable in foreign currencies, it could have intended to include obligations which were to become absolutely payable in a foreign currency upon the exercise of a right of election plainly given the payee by the contract. Of course the Congress knew that Americans owed obligations absolutely payable in foreign currencies. It plainly did not intend to include them in the Joint Resolution. Of course it knew that there were multiple currency bonds outstanding which might, as the holder should elect, become payable in some foreign currency. If it had intended to include them in the latter event, it would have said so in plain words, and in that case it would also have included all obligations payable in foreign currencies as well, for it cannot be supposed that it intended to exclude creditors who were bound to accept a foreign currency and include those who had the choice of receiving either a specified number of dollars or a specified

amount of a foreign currency in the event that the foreign currency was chosen. If the Congress did intend such a discrimination, then it intended to deprive holders of a plain contract right of election. Surely such an intention should not be ascribed to the Congress in the absence of plain words requiring it. Such an intention cannot be spelled out of the words "every obligation payable in money of the United States heretofore or hereafter incurred". In reducing the second sentence of the enacting clause of the Joint Resolution to its lowest terms, the petitioner omits the last four words above quoted and also the significant phrase "whether or not any such provision was contained therein or made with respect thereto" (Brief, p. 19), but later explains that the former omission is of no consequence because to "incur" means—the petitioner is careful to say "*inter alia*"—"to become subject to" and is synonymous with "contract" (Brief, p. 24). Thus "obligation incurred" means, says the petitioner, "agreement contracted" or "contract to which a party has become subject"; or, it might have added, if different definitions had been selected, "debt incurred". All of which goes to show how much can be proved by judicious use of the dictionary.

We submit that if the Congress had intended to abrogate foreign currency obligations or to deprive holders of the contract right to require payment in foreign currencies, it would have said so in plain words, and would not have defined "obligation" as an obligation "payable in the money of the United States" and would not have used the phrase "shall be discharged upon payment, dollar for dollar", which is appropriate only to dollar obligations.

The petitioner assumes that the Joint Resolution can not apply to the promises to pay dollars in gold in New

York unless it applies to the alternative promises as well and so reaches the *reductio ad absurdum* that on the respondent's construction it would not be unlawful "to issue bonds and coupons of identical tenor at the present time", since they will not become payable in the money of the United States unless and until the holder so elects (Brief, p. 27). That overlooks the first sentence of the enacting clause which has more than one important bearing on the meaning of the second sentence. Its concluding words are "and no such provision", *i. e.*, gold clause, "shall be contained in *or made with respect to* any obligation hereafter *incurred*" (italics ours).

The Determination Made by the Congress to Support Its Enactment.

The petitioner has heretofore argued that the preamble is of little significance in determining the intent and purpose of the Congress. It does not repeat that argument in this Court.

Undoubtedly enacting clauses, if plain and unambiguous, will control over preambles. But the particular preamble involved had more than usual significance. The Congress knew that its proposed enactment would be challenged in the courts. It knew that serious doubts of its constitutional validity were entertained by many. So it made and stated in the preamble a determination to support its enactment. This Court held that that determination was not so destitute of any basis as to warrant the Court in going behind it. It would indeed be surprising under those circumstances to find an enactment not fully supported by the determination.

It is undisputed that the determination stated in the preamble only relates to so-called "gold clauses", to the particular provisions "which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby". Such provisions only, not alternative and independent provisions, were determined to be an obstruction to "the power of the Congress to regulate the value of the money of the United States" and inconsistent with its declared policy.

It is likewise undisputed that the first sentence of the enacting clause deals only with "gold clauses". They, and they alone, were declared to be against public policy and forbidden for the future. That invalidated the contingent promise found in the bonds and coupons in suit to pay, in New York, dollars in gold coin of the United States, and made it impossible for the obligor to perform that particular promise if it had been chosen, but that did not relieve it of the duty to perform any of the other alternative and wholly independent promises.

See citations *ante*, p. 13.

It did not deprive the holder of the choice to receive payment in Zurich in Swiss francs, and we again emphasize the fact that the promise was to pay a stated number of Swiss francs, not the equivalent of a stated number of dollars in Swiss francs, as the dissenting Judges below erroneously supposed.

The contention of the petitioner is thus necessarily narrowed to the proposition that the Congress having, for the purpose of supporting its enactment, made a determination that "gold clauses" obstructed its power and were inconsistent with its declared purpose, and having like-

wise enacted that such clauses were against public policy and forbidden, then proceeded to enact *by implication* that provisions purporting to give the obligee the option to require payment either in money of the United States or in foreign currency or other media shall be construed and enforced as giving the obligee the right to require payment in money of the United States only, irrespective of whether the particular provision for payment in money of the United States is a "gold clause" or not; and indeed the petitioner does so contend (Brief, p. 19), but adds that for the purposes of the instant case it is only necessary to hold that the obligee's right of election is destroyed if the provision for payment in money of the United States is one of those "specifically condemned" (Brief, p. 20).

That implication is derived from the second sentence of the enacting clause which, paraphrased, reads, "Every obligation payable in the money of the United States heretofore or hereafter incurred, whether or not a gold clause is contained therein, shall be discharged dollar for dollar, etc."

If the petitioner's construction be accepted at all, the sentence means that a promise to pay in money of the United States, whether in gold or not, or at the option of the obligee in other media, is a promise to pay in the money of the United States only.

The petitioner proves too much. It cannot save the situation by suggesting that the Court stop half way. There is no stopping place at the "specifically condemned" provisions. If the second sentence is applicable to the foreign currency provision in suit, it would be equally applicable if the dollar promise had made no reference to gold but had merely been a promise to pay $25 on each coupon. The

phrase "whether or not any such provision is contained therein or made with respect thereto" makes that conclusive.

The second sentence of the enacting clause was either intended to make the devalued dollar legal tender for all dollar obligations, whether payable in gold or not, as we contend, or it was intended to make all obligations payable in dollars, if there was a single optional provision payable in dollars though not in gold.

Construing "obligation" as meaning "the instrument creating the debt or obligation" and "payable" as meaning "may be payable", it may be possible to work out a literal interpretation requiring obligees having an option to require payment in dollars or other media to accept dollars. If those words were used in that sense, the sentence may mean that. It cannot by that method of interpretation mean less.

Thus the petitioner's construction is a good example of distortion by etymological dissection and reconstruction. It ignores the declared purpose and intent of the Act. It disregards the context. It convicts the Congress of making a sham determination to support a palpable invasion of constitutional rights, having no possible support either in fact or in the determination made. Requiring a creditor, who has a plain contract right to receive 129.50 Swiss francs, to accept $25 in discharge of the obligation due him could not be justified on the ground that the discharge of the obligation according to its terms would obstruct or interfere in the slightest with the power of the Congress over the monetary system of the United States or with its declared purpose and intent. An optional contract right to receive Swiss francs could not be put in a different class

from a contract right to receive Swiss francs and nothing else.

Moreover the regulation of foreign exchange, the discharge of obligations payable in foreign currencies and the stabilization of the exchange value of the dollar were exclusively dealt with by the other Acts *in pari materia* above referred to and in a manner to make it manifest that the intention was to facilitate and not to inhibit or interfere with normal transactions in foreign exchange.

A few quotations may be pertinent:

> "It is not proper to confine the attention to the one section to be construed. 'It is always an unsafe way of construing a statute or contract to divide it by a process of etymological dissection, into separate words, and then apply to each, thus separated from its context, some particular definition given by lexicographers, and then reconstruct the instrument upon the basis of these definitions. An instrument must always be construed as a whole, and the particular meaning to be attached to any word or phrase is usually to be ascertained from the context, the nature of the subject treated of and the purpose or intention of the parties who executed the contract, or of the body which enacted or framed the statute or constitution.'" (*Lewis' Sutherland, Statutory Construction*, 2d Ed., 1904, pp. 707-8.)

> "The words 'shall upon arrival in such State or territory be subject to the operation and effect of the laws of such state or territory,' in one sense might be held to mean arrival at the state line. But to so interpret them would necessitate isolating these words from the entire context of the act, and would compel a construction destructive of other provisions contained therein. But this would violate the fundamental rule requiring that a law be construed as a

whole, and not by distorting or magnifying a particular word found in it." (*Rhodes* v. *Iowa*, 170 U. S. 412, 421.)

"The point is made, however, that the word 'obligations,' as it occurs in another part of the act, has been given a narrower construction, and that this is persuasive of the restricted meaning contended for here. That much may be conceded, since 'there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning.' *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 433. But since most words admit of different shades of meaning, susceptible of being expanded or abridged to conform to the sense in which they are used, the presumption readily yields to the controlling force of the circumstance that the words, though in the same act, are found in such dissimilar connections as to warrant the conclusion that they were employed in the different parts of the act with different intent." (*Helvering* v. *Stockholms Enskilda Bank*, 293 U. S. 84, 86-7.)

"Words generally have different shades of meaning, and are to be construed if reasonably possible to effectuate the intent of the lawmakers; and this meaning in particular instances is to be arrived at not only by a consideration of the words themselves, but by considering, as well, the context, the purposes of the law, and the circumstances under which the words were employed." (*Puerto Rico* v. *Shell Co.*, 302 U. S. 253, 258.)

The Court of Appeals has construed the contract and determined the rights and obligations of the parties "on the facts of this case", and has held that the obligation in the instant case was not "payable in the money of the

United States". In other words, the Court of Appeals has held, as the law is, that the rights and obligations of the parties are precisely the same as though the contract had originally contained but one absolute promise, namely, a promise to pay a stated number of Swiss francs in Switzerland.

No one claims that the Joint Resolution touches such a promise. Is a promisee in worse case who also had the alternative of demanding a stated number of dollars whether in gold or not?

It has heretofore been urged that there was no point in the second sentence of the enacting clause, unless the Congress intended to go beyond the first sentence and the preamble and strike down not merely the particular provisions, *i. e.*, "gold clauses", determined to be an obstruction to its power and inconsistent with its declared purpose and declared to be against public policy, but also the entire instrument containing such clauses as well. If so, it was certainly very inept in expressing its intention. That argument has not been repeated in the petitioner's brief for it plainly was necessary to go further. Without more it would have been left in doubt how obligations created by the condemned clauses were to be discharged, or even whether they were to be discharged at all, and so the Congress was careful to remove that doubt and to implement what had been enacted and determined by providing, as we say, that the condemned "gold clauses" should be put in the same class with all other dollar obligations and discharged in the same manner.

Certainly such a construction must be preferred to one which would abrogate vested contract rights not found by the Congress to be an obstruction to its power or incon-

sistent with its purpose and in respect of which there is no basis for such a finding.

Petitioner's Argument Based on Selected Dictionary Definitions.

Abandoning most of the arguments it has heretofore made, the petitioner attempts to prove by selected dictionary definitions of isolated words that "The Joint Resolution by its express terms makes it plain that obligations are 'payable in money of the United States,' even though the obligees have the right by the terms thereof to require payment in another medium" (Brief, p. 25). It should have added "and are not payable in such other medium even though the obligees have actually exercised their contract right to require payment therein".

Having thus proven to its own satisfaction that the instant case is within the letter of the Act, the petitioner poses the question whether the Congress *"would"* have excepted bonds "alternately payable in foreign currencies" if it had thought about them (Brief, p. 38). It concludes from other acts *in pari materia* that if the Congress had given consideration to the subject it *would* have relieved the petitioner and those in like case of contract obligations made burdensome by the world economic collapse and would have deprived obligees of their contract rights to require payment in other media than the money of the United States in those cases only in which obligees had a rejected and unenforceable option to require payment in dollars in gold, indeed even in cases in which there was a dollar option without any reference whatsoever to gold. A promise to pay $25 in New York or, at the option of the promisee, 129.50 Swiss francs in Zurich would be just as

plainly within the letter of the Act as one to pay in the alternative $25 in gold or 129.50 Swiss francs. Both, under the petitioner's construction of the Act, would be "payable in money of the United States" and discharged by the payment of $25. A creditor having no choice but to receive 129.50 Swiss francs could recover damages for their nonpayment. A creditor having the choice of receiving $25, whether in gold or not, or 129.50 Swiss francs would have to be satisfied with the payment of $25.

The question is what did the Congress intend, not what it would or might have intended if it had considered matters which the petitioner assumes it did not consider.

We learn the intention of the Congress from the whole Act construed with all the other acts *in pari materia*. In no case did the Congress leave its intent and purpose to inference. Some other or different intent and purpose is not to be ascribed even though it may be within the letter of an isolated phrase. The Act gives us a definition which was plainly intended to exclude obligations payable in other media than the money of the United States.

Dictionary definitions, with their subtle shades of meaning, are certainly no more than aids to interpretation.

> "* * * definitions by the average man or even by the ordinary dictionary with its studied enumeration of subtle shades of meaning is not a substitute for the definition set before us by the lawmakers with instructions to apply it to the exclusion of all others" (*Fox* v. *Standard Oil Co.*, 294 U. S. 87, 96).
>
> "The same words may have different meanings in different parts of the same act and of course words may be used in a statute in a different sense from that in which they are used in the Constitution" (*Lamar* v. *United States*, 240 U. S. 60, 65).

"Obligation incurred" certainly connotes a debt incurred even according to the dictionary meanings of "obligation" and "incur", whilst "obligation issued" may refer to the instrument evidencing the debt. "Payable" may mean, according to the dictionaries, either that which *is* payable, or that which *may be* payable. Even a carefully drawn Act may use the same words with different shades of meaning, and the draughtsman may not be conscious of the subtle distinctions which a studious critic may discover with a scalpel. But certainly the Joint Resolution was too carefully drawn to have left it to be inferred from subtle distinctions that obligees having the plain contract right to require payment in other media must accept dollars if they also had an option to demand dollars, if that had been the intention. Yet the petitioner is at last driven to the position that that is the precise effect of the Act according to its construction.

The word "obligation" does appear to have been somewhat loosely used. But the definition "payable in money of the United States" could only have been intended to differentiate between obligations payable in money of the United States and obligations payable in foreign currencies or other media. The latter were thus plainly put outside the Act. It is difficult to conceive of the use of that definition to distinguish between obligations in terms solely payable in foreign currencies or other media than the money of the United States and those so payable by the lawful choice of obligees who also might have demanded payment in dollars. And it is quite impossible to conceive of any legitimate reason for making such a distinction.

We assume that the alternative promise to pay dollars in gold is within the Act irrespective of whether it is within

its letter, but we submit that the contract right of holders to require payment in other media was not abrogated or intended to be abrogated by the Act even though the phrase "every obligation payable in money of the United States, heretofore or hereafter incurred", may literally be interpreted to mean the instrument under which the duty or obligation is incurred.

Meaning of Term "Gold Clause":

The petitioner says that the term is a misnomer, that the Joint Resolution is not confined to "gold clauses", that the Congress did not "content itself with denouncing gold clauses *and other provisions for payment*" (Brief, pp. 33-35). The subtle addition of the words we have just italicised should not escape notice.

Of course the term does include any coin or currency of the United States. It was in fact defined by the Congress itself in Joint Resolution No. 63 of the 74th Congress, approved August 27, 1935, thus:

> "* * * 'gold clause' means a provision contained in or made with respect to an obligation which purports to give the obligee a right to require payment in gold, or in a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, declared to be against public policy by Public Resolution Numbered 10 of June 5, 1933;" (49 Stat. L. 939).

One of the preambles of that Resolution stated the purpose of the Congress in passing the "gold clause" resolution and the end intended to be attained precisely as the respondent contends the actual intention was:

"Whereas in order to maintain the uniform value of all coins and currencies of the United States, Public Resolution Numbered 10 of June 5, 1933, declared provisions known as 'gold clauses' to be against public policy, prohibited their use in obligations thereafter incurred, *and provided that money of the United States legal tender for obligations generally was legal tender for all obligations with or without gold clauses;*" (49 Stat. L. 938). (Italics ours.)

"Obligations with or without gold clauses" obviously means dollar obligations since there is and can be no possible manner of doubt that foreign currency obligations *generally* were expressly excluded from the Joint Resolution by the definition "payable in money of the United States".

The purpose thus plainly stated was to put all dollars on a parity and to make them legal tender for all dollar obligations and not "to place all obligations, whatever their provisions for payment, upon a parity," as petitioner contends.

The Government certainly assumed in the *Norman* case that the "gold clause" resolution was limited to "gold clauses" and that assumption seems to be implicit in the judgment of the majority of this Court, as we read it.

The *Norman* Case.

We quote from the summary of the argument as officially reported (294 U. S. 273-278):

"The importance of the gold clause is due to the overwhelming amount of obligations calling for payment in gold coin issued and outstanding on June 5, 1933, the best estimates placing the amount at approximately $100,000,000,000.

"Congress was justified in declaring that gold clauses are contrary to public policy and inconsistent with our present monetary system. The gold clause had its origin in a period when there was in existence a dual monetary system;—that is, two kinds of money, United States coins and circulating notes, were permitted to circulate, fluctuating in value one against the other. * * *

* * * * * * * *

"* * * During February and until March 6, 1933, when the banking holiday was proclaimed, $476,100,000 in gold was withdrawn from the Federal Reserve Banks and the Treasury.

* * * * * * * *

"Gold clauses, if enforceable, would have obstructed the exercise of the monetary and other powers of the Federal Government, whether such clauses are construed to call for payment in gold coin itself or in an asserted equivalent in currency. The gold clause would nullify the power of the Congress to make all forms of coins and currency of the United States legal tender for all payments. It is an obstruction to the power of the Congress to regulate the value of money by changing the gold content of the dollar. * * * Non-enforcement of gold clauses results in no real loss to creditors. * * *

* * * * * * * *

"Gold clauses are an obstruction to the power of Congress to borrow money; for pending a change in the gold content of the dollar, bonds would be issued which might incur for the taxpayers a debt greatly in excess of the amount received for the bonds. It would be impractical to eliminate the gold clause from future issues only, since investors would prefer the old issues, public or private, to such an extent as to require prohibitive rates on the new.

"Gold clauses, by interfering with a change in the gold content of the dollar, obstruct the power of Congress to regulate foreign exchange and foreign commerce.

* * * * * * *

"The gold hoarding orders, independently of the Joint Resolution of June 5, 1933, require that the claim on the bonds be limited to the face amount thereof. A free domestic gold market did not exist, in consequence of these orders, from the time of the banking holiday in March, 1933, to the present. The gold clause should be interpreted as calling simply for payment in gold coin. (Citing cases.) Payment in gold coin is impossible and illegal because of the gold hoarding orders, and should be excused. (Citing cases.) Recovery is properly limited to the face amount of the bonds. Since if gold coin were paid to the creditors it would be worth to them only its face amount, payment of a greater sum would be a windfall, not indemnity for loss. (Citing cases.)"

Mr. Chief Justice Hughes thus stated the question before the Court in the *Norman* case:

"These cases present the question of the validity of the Joint Resolution of the Congress, of June 5, 1933, with respect to the 'gold clauses' of private contracts for the payment of money." (*Id.*, 291.)

Every word said by him related to the question which he said "touches the validity of these measures at but a single point, that is, in relation to the Joint Resolution denying effect to 'gold clauses' in existing contracts". (*Id.*, 297.)

The Decision in Anglo-Continental Treuhand, A.G. v. St. Louis Southwestern Railway Co. (81 Fed. 2d 11). Certiorari denied 298 U. S. 655.

The petitioner says that there is a glaring omission from Judge Learned Hand's opinion in that case of any discussion of the second sentence of the enacting clause. We stand upon that opinion. Its cogency and adequacy leave little to be said. So the majority of the Court of Appeals and the dissenting Justices of the Appellate Division thought. So we assume this Court must have thought in denying certiorari in a case involving the construction of a federal statute of such importance with a mass of litigation pending and threatened in both the state and federal courts dependent upon the proper construction of the Act. Judge Hand did not fail to consider the second sentence of the enacting clause, as is charged. He specifically referred to the petitioner's construction of it and said—

> "That would put these bonds within the resolution as to the promise to pay dollars in gold, as of course they are, but it does not advance the defendant's case a whit as to the other promises."

The Evil Aimed At.

The petitioner claims that it is within the class of debtors which the Act was passed to relieve. The Act was not passed to enable debtors to repudiate their contracts. That certainly was beyond the power of the Congress. Certainly there was no intention to relieve debtors owing obligations payable in foreign currencies. It is no worse for the petitioner to perform the promise assumed by it to pay a specified amount of Swiss francs to a creditor who had an option to demand dollars than it is for some other debtor to perform its promise to pay Swiss francs to a

creditor who has no option but to receive Swiss francs. It may be its misfortune that to sell its bonds its predecessor incurred what has turned out to be a hazardous risk. The petitioner assumed that risk after currency devaluations abroad were well on the way, with everything to indicate that that would be to the advantage of American debtors owing obligations payable in foreign currencies. We do not have to go to the dictionary or indulge in inference to know the purpose of the Joint Resolution. The Congress stated it in the Act itself, "To Assure Uniform Value to the Coins and Currencies of the United States" and "to maintain at all times the equal power of every dollar."

The evil aimed at was also stated, *i. e.*, gold obligations under "gold clauses", which because of their magnitude obstructed the power of the Congress to devalue the dollar. The relief of debtors owing gold obligations was incidental, but it is undisputed that there was no thought of relieving debtors owing obligations payable in foreign currencies. The only monetary legislation affecting them was the Thomas Amendment, the Emergency Banking Act, the orders and regulations under it and the Gold Reserve Act. The governing purposes of those Acts were to prevent hoarding and the flight of gold, to raise prices, to protect our foreign commerce from the adverse effects of the depreciation of foreign currencies, to regulate foreign exchange and *to stabilize the exchange value of the dollar.* Whatever effect those Acts might have on debtors and creditors, buyers and sellers was also incidental.

It is quite true that it would require more dollars to buy Swiss francs or any other commodity after devaluation than before, but the dollars would all have equal buying and debt-paying power. It was not the purpose of the Joint Resolution to relieve anyone from the inflationary

results of an Act intended to be inflationary. Its sole purpose was to make all dollar obligations payable in legal tender dollars of equal value.

The Petitioner's Conception of the End to Be Attained by the Joint Resolution.

If the petitioner's conception of the end sought be correct, the Joint Resolution was plainly invalid.

The petitioner assumes that the Congress did not have the few American debtors in mind who chanced to owe Dutch guilders or Swiss francs, but argues that if it had thought of them it would not have excluded them from the class it intended to relieve, especially as devaluation was authorized for their "primary benefit" (Brief, p. 45), and that "One of the broad underlying purposes of the Resolution was to place all obligations payable in money of the United States, whatever their provisions for payment, on a parity" (*Id.*).

Of course the petitioner does not say in so many words that the Resolution was passed for the relief of debtors. That would be too bald.

We say that the Resolution was not passed for the benefit or relief of any individual, group or class, and that if it was it was invalid. No more was the Thomas Amendment passed for the benefit of the petitioner or others such as the petitioner, as is claimed. The latter Act was passed to further its declared purposes to stabilize domestic prices and to protect foreign commerce from the adverse effects of the depreciation of foreign currencies, both of course in the general interest.

The Congress did not concern itself with the consequences to particular individuals, groups or classes. It knew that it would cost Americans more to buy foreign

currencies with which to purchase foreign goods or pay debts payable in such currencies. It doubtless did not consider that serious since the principal currencies of the world were already relatively as low or lower than the contemplated devalued dollar, and the two exceptions were likely to be. Currency depreciation and devaluation were the order of the day and exceptional cases could not be provided for. It knew, of course, for it had been a matter of too much public discussion both in and out of Congress to be overlooked, that the American public had bought billions upon billions of foreign dollar bonds.

The Joint Resolution was passed, if what the Congress said about it is to be accepted, not to relieve debtors, not to put obligations on a parity, but to assure the uniform value of all coins and currencies of the United States and to maintain the equal power of the dollar. Those ends were plainly within its constitutional authority. A dollar, worth only its gold content in paying power in the discharge of gold obligations, and a hundred cents in the discharge of other obligations, would, with seventy-five to a hundred billions of gold dollar obligations outstanding, result in a very substantial degree in a dual monetary system, gold value dollars in effect for one purpose, legal tender dollars for another. That would seriously dislocate our domestic economy in a great variety of ways. It was the declared purpose and policy of the Congress to prevent that by the exercise of its power over the monetary system of the country, let the consequences be what they might to individuals, groups or classes. Of course it was believed that that would promote the general good, though necessarily there would be many variations in the consequential benefits and burdens. It happens that the Swiss franc and

the Dutch guilder are relatively somewhat higher than the dollar, but no one knows where they may be a month from now. Of course the Congress could not guard against, or take measures to protect anyone from the consequences of, such variations.

In the last analysis the petitioner's contention really comes to this: The Joint Resolution and the Thomas Amendment as well were really passed for ulterior ends. Those stated by the Congress were not the true ends. If that view be accepted, both were unconstitutional.

This Court divided in the *Norman* and companion cases, not on the power of the Congress over the monetary system of the country, but on the question whether the ends stated by the Congress were the true ends sought to be attained by the challenged legislation.

Mr. Justice McReynolds thus stated the position of the minority:

> "The fundamental problem now presented is whether recent statutes passed by Congress in respect of money and credits, were designed to attain a legitimate end. Or whether, under the guise of pursuing a monetary policy, Congress really has inaugurated a plan primarily designed to destroy private obligations, repudiate national debts and drive into the Treasury all gold within the country, in exchange for inconvertible promises to pay, of much less value.
>
> "Considering all the circumstances, we must conclude they show that the plan disclosed is of the latter description and its enforcement would deprive the parties before us of their rights under the Constitution" (294 U. S. 369-370).

Mr. Chief Justice Hughes thus summarized the views of the majority:

> "We are not concerned with consequences, in the sense that consequences, however serious, may excuse an invasion of constitutional right. We are concerned with the constitutional power of the Congress over the monetary system of the country and its attempted frustration. Exercising that power, the Congress has undertaken to establish a uniform currency, and parity between kinds of currency, and to make that currency, dollar for dollar, legal tender for the payment of debts. In the light of abundant experience, the Congress was entitled to choose such a uniform monetary system, and to reject a dual system, with respect to all obligations within the range of the exercise of its constitutional authority" (*Id.*, 316).

Ironically enough, the petitioner supports the view of the minority as to the purpose of the Act and on that view wants to extend it to a case which we submit is not even within its letter and most certainly is not within its intent, construed according to its natural and plain meaning.

POINT III.

Upon the petitioner's construction, the Joint Resolution violates the Fifth Amendment of the Constitution of the United States for (a) abrogating contract rights which did not obstruct the intended exercise of power by the Congress, and (b) arbitrarily discriminating between creditors in the same class.

(A) The Congress did not determine that obligations payable by Americans in the currencies of other countries obstructed its power to regulate the value of the money of the United States, or that they were inconsistent with its declared purpose to maintain the equal power of the dollar.

(B) Upon the petitioner's construction the Resolution obviously discriminates—we say arbitrarily—between obligations which give obligees the right to require payment in foreign currencies and nothing else and those which give obligees the right to require payment in foreign currencies with an option to demand dollars,—between obligations in terms payable only in a foreign currency and those so made payable by the exercise of an undoubted contract right.

The above propositions involve direct effects of the Act, not indirect effects upon particular individuals, groups or classes, necessarily as variable as the special circumstances controlling them. We assume that the Act was passed for the purposes stated by the Congress in the exercise of its power over the monetary system of the country, neither to favor, to burden or to relieve any group or class, creditors or debtors, buyers or sellers. We also assume that if obligations payable in foreign currencies, either absolutely or upon the lawful choice of the obligees, were in fact an obstruction to the power of the Congress, although it did not so find—a cogent reason for thinking otherwise—and if there was any reasonable basis for discriminating between such obligations merely because the holder of one had a dollar option and the holder of another did not, the validity of the Act, even as construed by the petitioner, would be settled by the decision of this Court in the *Norman* case.

Our position is that there is no basis for finding either of the facts, both of which are necessary to sustain the Act upon that construction, and neither of which was found by the Congress, although it was careful to express the determination of fact on which it based its enactment.

An argument has been made, but not by the petitioner, that unless obligations payable in foreign currencies are within the Joint Resolution, it arbitrarily discriminates between creditors to whom gold obligations are owing and those to whom foreign currency obligations are owing. If that be so, the Resolution is unconstitutional, because concededly it does not cover obligations payable in foreign currencies, unless the obligees also have dollar options, which they have rejected.

The argument is made that alternative foreign currency provisions are the equivalent of the "gold clause" provision, because intended to give the obligees the right to demand the most advantageous currency at the time of the demand and thus to give them an additional assurance of receiving gold coin value. Undoubtedly the intent was to give holders, wherever they might be, the right to demand the most advantageous currency at the time of payment. The issuer thought that would enable it to sell its bonds to the best advantage. The other conclusion is a *non-sequitur*.

The promise to pay in gold coin of the United States obviously was not fortified in the slightest degree, as far as gold payments were concerned, by alternative promises to pay at the option of the holder specified amounts of foreign currencies without any reference whatsoever to gold. The different currencies named were on a gold basis at the time of the promise and had they remained so, convenience might have been the chief consideration in determining the election of the holder. But the promise to pay specified amounts of foreign currencies was not tied to gold or gold value in any way, and did not give any additional assurance to holders of receiving gold coin value, as would a promise

to pay a stated number of dollars in gold or the equivalent in either of the currencies named.

No one knew in 1910 what changes might occur in the monetary conditions of the world or in any of the countries whose currencies were involved, even including the United States. To make its bonds more saleable, the issuer decided to take the risk of whatever changes might occur. No doubt it did not anticipate the World War or the dislocations consequent upon it. But the law can take no account of that. The issuer did not take the risk of the gold value of the foreign currencies named. It gave holders the option to require payment in dollars in gold *or* in *specified* amounts of six foreign currencies regardless of their gold value or dollar value, no matter what might happen. It so happens that the United States has abrogated the promise to pay dollars in gold and that all the other currencies have depreciated in varying amounts below their gold value at the time of the promise. That risk was on the holders. None the less, and even for greater reason, in that situation they have the right to choose the currency most advantageous to them, for the contract in plain and unambiguous terms gave them that right, and it is of no consequence whether the issuer anticipated all that has occurred. It assumed all of the risks involved in its promise which it failed to guard against, but it did not assume any risks of the gold value of the foreign currencies that holders were given the right to choose.

As events have fallen out, holders of multiple currency bonds have been denied the option to require payment in the specified number of gold dollars in common with everyone else who had contract rights to require payment in gold dollars. That risk again was on the holder, not on the

obligor—all the more reason for not denying the holders the rights which survive the abrogation of "gold clauses".

As matters stand, the respondent might, after the passage of the Joint Resolution, have required payment of 25 legal tender dollars on each coupon, or of either of the specified amounts of pounds, guilders, reichsmarks, or French, Belgian or Swiss francs, and the relative value of those currencies either to each other or in relation to gold is of no consequence whatever, except as that might influence the choice precisely as was intended when the promise was made. In the last analysis the petitioner's contention rests upon the proposition that, if the original promise had been one to pay at the option of the promisee 25 legal tender dollars or 129.50 Swiss francs, the respondent would have to accept $25.

The respondent has chosen to be paid 129.50 Swiss francs on each coupon. The alternative promises have been obliterated.

We maintain that if the Joint Resolution nullified the respondent's contract right of election it is an unlawful invasion of a vested contract right and an arbitrary discrimination between an obligation that has become absolute by the exercise of a contract right of choice and precisely the same kind of obligation which afforded the obligee no choice, and that the exercise of those rights will not interfere in the slightest degree with the maintenance of a uniform monetary system in the United States.

It is unnecessary to labor the point further, since the Resolution is plainly susceptible of a construction which avoids it.

See—

Federal Trade Commission v. *American Tobacco Co.*, 264 U. S. 298, 307;

Panama R. R. Co. v. *Johnson*, 264 U. S. 375, 390;

Missouri Pacific Railroad Co. v. *Boone*, 270 U. S. 466, 471-2;

Blodgett v. *Holden*, 275 U. S. 142, 148;

Richmond Screw Anchor Co. v. *United States*, 275 U. S. 331, 346.

Conclusion.

The judgment below should be affirmed.

February 6, 1939.

Respectfully submitted,

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